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TO: Federal Communications Commission

FROM: National League of Cities; United States Conference of Mayors; National Association of Counties; National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; City of Los Angeles, California; City of Chillicothe, Ohio; City of Dearborn, Michigan; City of Dubuque, Iowa; City of St. Louis, Missouri; City of Santa Clara, California; and City of Tallahassee, Florida

DATE: April 26, 1996

RE: **Open Video Systems (CS Docket No. 96-46): Right-of-Way Issues**

I. INTRODUCTION

Open video system ("OVS") rules must acknowledge local governments' property interests in the public rights-of-way. Any OVS regulations promulgated by the Commission that allow OVS providers to place OVS systems in local rights-of-way without regard to local governments' property interests in those rights-of-way would merely embroil local governments, OVS providers and the federal government in complex, lengthy Fifth Amendment litigation and thereby delay indefinitely the implementation of OVS, contrary to the statute's objectives.

In their reply comments in this docket, local exchange carriers ("LECs") appear to acknowledge that such an intrusion into the public rights-of-way would be a taking, and then proceed to encourage the Commission to issue rules that would purport to justify such a taking. (This should not be surprising, since compensation for the taking would come out of federal taxpayers' pockets rather than the LECs'.) This memorandum responds to the arguments raised by the LEC reply comments on this issue.

II. THE 1996 TELECOMMUNICATIONS ACT DOES NOT ELIMINATE LOCAL COMMUNITY CONTROL OVER THE PUBLIC RIGHTS-OF-WAY.

Some LECs seek to argue that the OVS provisions contained in the 1996 Act preclude state and local governments from managing and requiring fair compensation for the use of their public rights-of-way.[1] These arguments wilt under scrutiny.

A. The 1996 Act Does Not Exempt OVS Operators from Franchise Requirements Other Than the Title VI Franchise Requirement.

Bell Atlantic et al. allege that the OVS statutory provisions represent an "explicit" preemption of all franchise requirements.[2] This is incorrect. Section 653(c) merely exempts

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[1] See, e.g., Reply Comments of Bell Atlantic et al. at 34.

[2] Reply Comments of Bell Atlantic et al. at 30, 33-34. See also U S West, Inc. Reply Comments at 12; Reply Comments of the United States Telephone Association at 6.

an OVS from Section 621 — the federal law requirement that a cable operator may not provide cable service without a "franchise" as defined in Title VI. Exempting OVS from the Title VI requirement of a local cable franchise has no effect whatsoever on any requirement under state or local law for right-of-way authorization, whether or not denominated a "franchise," and whether or not related to cable television.

Title VI did not create local communities' franchising authority. Such communities were granting franchises, including cable franchises, long before Title VI was enacted. Their authority is derived from their property interests under state and local law.[3] Title VI merely added a new federal law franchising requirement. Moreover, Title VI never purported to deprive any community of the right to franchise the use of its public rights-of-way, whether for cable, telephone, street railways, or any other use of local streets. Bell Atlantic et

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[3] Thus Bell Atlantic et al. miss the point when they argue that the Fifth Amendment does not give local communities their property rights. Reply Comments of Bell Atlantic et al. at 31. The Fifth Amendment merely protects pre-existing property rights. Similarly, the St. Louis case does not need to cite the Fifth Amendment specifically when it holds that a city has a right to charge a utility for use of the public rights-of-way. Reply Comments of Bell Atlantic et al. at 32 n.85.

In this connection, Bell Atlantic et al. apply a peculiar double standard when, on the one hand, they argue that the Supreme Court's St. Louis decision that has stood for over a century is "far from clear," id. at 32 n.85, while claiming on the other hand that there is "express" and "explicit" authorization in the Act for a taking, even though no such language can be found.

al. are thus asking the Commission to venture onto entirely new and treacherous legal ground in the OVS rules by supposing that an exemption from the federal franchising requirement may be bootstrapped into a far broader preemption of all state and local law franchising requirements.[4]

An example will illustrate the point. The § 621 cable franchise requirement surely does not apply to taxicab companies. But no one would seriously suggest that taxicab companies' effective exemption from the reach of § 621 somehow preempts the Los Angeles City charter requirement that taxicab companies must obtain a City franchise.

NYNEX manages to take both sides of this argument on a single page. NYNEX first correctly asserts that nothing in the 1996 Act or its legislative history indicates that Congress intended to preempt local governments' rights to control the use of local rights-of-way or to obtain reasonable compensation for their use. Then, in the following paragraph, NYNEX argues that local governments must not be permitted to impose "franchise-type" requirements on OVS. NYNEX Reply Comments at 17. These positions, however, are inconsistent. A "franchise" is the

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[4] For the same reasons, the LECs' attempt to dodge the Bell Atlantic collocation case, Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), is fruitless. Reply Comments of Bell Atlantic et al. at 34 n.93. The franchise requirement of the Cable Act, from which an OVS operator is exempted, is distinct from any other franchise requirements that may obtain under state and local law, about which the statute is silent.

mechanism through which a local government controls and receives compensation for use of its rights-of-way. Indeed, outside the cable-specific context of the Title VI "franchise" definition, a "franchise" is more generally defined as a negotiated long-term contract between a private enterprise and a governmental entity for the use of public property.[5]

Thus, any attempt to restrict a local government's general franchising authority (as distinct from the cable franchise requirement of Title VI) would effectively usurp the local government's rights to control these rights-of-way and would effect a taking under the Fifth Amendment.

B. Sections 253 and 653 Do Not Usurp Local Authority to Control the Public Rights-of-Way.

No matter how often they repeat the phrases "express" and "explicit," Bell Atlantic et al. can find no trace, explicit or otherwise, of any congressional desire to effect a taking of

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[5] See, e.g., Santa Barbara County Taxpayers' Ass'n v. Board of Supervisors, 209 Cal. App. 3d 940, 949, 257 Cal. Rptr. 615, 620 (1989).

local public property.[6] The statute simply does not say any such thing.

In an attempt to bridge this gap, Bell Atlantic et al. construct an argument that Sections 253 and 653 of the Act, in combination, should be read to make up for this lack of express statutory authority. They fail, however, to read the language of those Sections carefully. In fact, the language of Section 253(c) and (d) merely confirms Congress' explicit desire not to intrude on local government authority over local public rights-of-way, and its instruction that the Commission not preempt such authority.

1. Section 253(c) Affirms Local Government Authority Both to Manage, And to Obtain Compensation For, Public Rights-of-Way.

Bell Atlantic et al. cite § 253(c) for the proposition that the 1996 Act "limits local governments to a managerial role over rights-of-way."[7] But on its face, Section 253(c) explicitly

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[6] See, e.g., Reply Comments of Bell Atlantic et al. at 30, 31, 33, 34, 35. Thus, there is no logical connection between Bell Atlantic's statement that Congress has the power "to pass a law instructing the FCC to authorize OVS operators to use public rights-of-way in exchange for a compensatory fee," and the claim that Congress has actually done so ("Congress has already considered and decided this issue"). Reply Comments of Bell Atlantic et al. at 29.

[7] Reply Comments of Bell Atlantic et al. at 30 & n.78.

recognizes local governments' right both to manage the rights-of-way and to receive fair compensation for their use.

> (c) STATE AND LOCAL GOVERNMENT AUTHORITY.—Nothing in this section affects the authority or a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.[8]

2. Section 253(d) Deprives the FCC of Authority to Preempt Local Government Compensation and Management Authority Over Public Rights-of-Way.

Bell Atlantic et al. proceed to claim that "the Act gives the FCC an express right to 'preempt' local regulations that exceed a purely managerial function."[9] But Section 253(d), on which Bell Atlantic relies, actually makes clear that the Commission's preemption authority does not extend to right-of-way compensation issues under Section 253(c):

> If, after notice and an opportunity for public comment, the Commission determines that a state or local government has permitted or imposed any statute, regulation or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency.[10]

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[8] 1996 Act, Section 101(a) (adding § 253(c)) (emphasis added).

[9] Reply Comments of Bell Atlantic et al. at 30.

[10] 1996 Act, Section 101(a) (adding new § 253(d)) (emphasis added).

Thus, Section 253(d) only gives the FCC authority to preempt state or local requirements that violate Section 253(a) or Section 253(b) of the Act.[11] The FCC has no authority to preempt local requirements that might violate Section 253(c). Section 253(c) provides that "[n]othing in this section" — that is, § 253 as a whole, including the Commission's preemption authority in § 253(d) — affects local governments' control of the public rights-of-way. Thus, the Commission has no authority to preempt any state or local law or regulation based on a state or local government's authority to manage the public rights-of-way or to receive fair and reasonable compensation for their use, on a competitively neutral and nondiscriminatory basis. Disputes as to whether a particular local requirement falls within Section 253(c) are left to the courts, not the Commission.

3. Section 653 Does Not Exempt OVS Applicants From Their Obligation to Obtain Authorization to Use the Public Rights-of-Way.

Finally, Bell Atlantic et al. recite once again their claim that the statutory ten-day time limit on Commission approval of OVS certifications somehow excuses LECs from submitting a

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[11] Section 253(a) states that no state or local statute or regulation may prohibit an entity from providing telecommunications services. Section 253(b) provides that a state may impose certain requirements on a competitively neutral basis.

complete and comprehensive certification.[12] As shown in our comments, the reverse is true: the exceedingly short time allowed the Commission to evaluate a certification means that a LEC's certification must be thorough and complete to begin with. Nothing in Section 653 remotely suggests that the ten-day time limit was intended to prevent local governments from managing and obtaining compensation for the use of their public rights-of-way.

C. The OVS Provision Does Not Purport to Occupy an Entire Field of Regulation.

NYNEX acknowledges in its reply comments that "[n]othing in the Act or its legislative history indicates that Congress intended to preempt" the right of local governments to control their rights-of-way or obtain "reasonable compensation for their use."[13] At the same time, NYNEX argues that Congress intended to "'occupy the field' of open video regulation, leaving no room for state and local governments to supplement the regulatory scheme."[14] NYNEX cannot reasonably advance such a self-contradictory interpretation. Nor does NYNEX produce any support for its claim that Congress intended to exclude all other laws relating to OVS. In fact, it is clear from the OVS provision and

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[12] Reply Comments of Bell Atlantic et al. at 31 & n.81.

[13] NYNEX Reply Comments at 17.

[14] Id.

the Act as a whole (for example, the PEG provisions of § 653) that local governments retain an essential role with regard to OVS, as demonstrated in our comments.

III. ANY INTERPRETATION OF THE 1996 ACT THAT USURPS LOCAL CONTROL OVER PUBLIC RIGHTS-OF-WAY WOULD EFFECT A TAKING UNDER THE FIFTH AMENDMENT.

Our comments show that any attempt by the LECs to parlay the OVS rules into a federal giveaway of local right-of-way would be a taking of local community property, requiring just compensation under the Fifth Amendment. The LECs do not dispute this fact. Rather, they argue that the Commission should interpret the OVS provision to require such a taking and should try to establish that the fee in lieu of franchise fees constitutes sufficient compensation.[15] Neither point will hold water.

A. The LECs' Arguments That Congress Intended to Effect a Taking Lack Statutory Support.

Curiously, Bell Atlantic et al. begin by calling the Fifth Amendment issue a "smoke screen," just before they proceed to claim that the 1996 Act explicitly authorizes a taking.[16] Evidently even the LECs acknowledge that there is fire in this smoke.

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[15] Reply Comments of Bell Atlantic et al. at 32-35.

[16] Reply Comments of Bell Atlantic et al. at 31.

Bell Atlantic et al. appear to argue first that the Act explicitly authorizes a taking because "the statutory authority for the FCC's certification of OVS is explicit in the 1996 Act."[17] It is unclear how the Act's requirement that the Commission approve or disapprove a certification of compliance with FCC rules could possibly amount to an "explicit" instruction to take local property, much less "leave the FCC no alternative but to authorize OVS operators to use right-of-way in exchange for a fee," as Bell Atlantic et al. claim.[18] On the contrary, our comments demonstrate that the certification process is perfectly consistent with local authority over rights-of-way. To the extent Bell Atlantic et al. present any argument to the contrary, it is based upon the same erroneous interpretation of §§ 253 and 653 refuted above.[19]

Having failed to show any explicit authorization for a taking, Bell Atlantic et al. argue that a taking must be imputed by necessary implication. The LECs' "necessary" implication is apparently based on a claim of "[s]ubstantial evidence" that local communities would somehow delay the advent of OVS if permitted to exercise their authority over the public rights-of-

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[17] Reply Comments of Bell Atlantic et al. at 33 (emphasis added); see also id. at 34.

[18] Reply Comments of Bell Atlantic et al. at 34 n.93 (emphasis added).

[19] See Reply Comments of Bell Atlantic et al. at 33-34.

way.[20] The only support Bell Atlantic et al. offer for this sweeping accusation against local communities is a citation to a nine-year-old article by cable operator attorneys alleging "problems of municipal abuse" that supposedly occurred prior to the 1984 Cable Act.[21] This slur against local communities is unfounded. Even if those accusations were true (and they are not), and even if such anecdotal, non-legislative evidence were sufficient to establish congressional intent to effect a taking (which it is not), it misses the point: the 1984 Cable Act itself, as well as the amendments to Section 621 in the 1992 Cable Act, were designed to protect against any such perceived potential abuse, and there is no subsequent evidence of any such abuse.

In fact, cities and counties are eager for competition. (We note, for example, that Ameritech has encountered no difficulty in obtaining competitive franchises from local governments.) But encouraging competition is not the same thing as subsidizing one potential competitor with free or discounted use of the rights-of-way.[22]

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[20] Reply Comments of Bell Atlantic et al. at 34.

[21] Reply Comments of Bell Atlantic et al. at 34 & n.92.

[22] Congress could, of course, have decided to subsidize OVS by direct grants of federal funds. Similarly, the Commission may wish to contribute funds from its own federal appropriation to encourage the growth of OVS. What neither Congress nor the Commission is free to do is to contribute local communities'

B. The LECs Misinterpret the Controlling Case Law.

The LECs' response to the judicial holdings on takings consist largely of misdirection. Thus, Bell Atlantic et al. attempt to avoid the impact of the Loretto case by insisting that Congress can take property if it pays just compensation.[23] That undisputed principle alone, of course, does not show either that Congress has authorized such a taking in the OVS provision, or that any compensation Congress decides to give is just.[24]

Similarly, in responding to the Ramirez case, Bell Atlantic et al. retreat to the claim that the OVS provision expressly authorizes a taking. Ramirez, however, shows that the fee in lieu of provision in Section 653 does not resolve the question of

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valuable resources, without compensation, to subsidize OVS.

[23] Bell Atlantic et al. claim that Loretto does not support an owner's right to grant or deny consent to an invasion of its property. Reply Comments of Bell Atlantic et al. at 32. On the contrary, the Supreme Court acknowledged in Loretto that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Loretto v Teleprompter Manhattan CATV Corp., 458 U.S. 438, 435 (1982).

[24] Bell Atlantic et al. dismiss most of the League's taking's arguments, claiming that the Fifth Amendment does not protect the ability of property owners to refuse consent to a taking of their property for public use. While that is true if Congress does in fact carry out a taking, the LECs misread our argument. We actually stated that "*any attempt by the federal government to take away that right of consent [the right to grant or deny consent] is subject to the Takings Clause.*" Comments at 56. The point is that taking away a property owner's right to refuse or condition consent is in fact a taking, and the Takings Clause prohibits any taking of private property interests by the federal government without the payment of just compensation.

whether there is authority to take in the first place.[25] As shown above and in our comments, the text of the Act is sufficient to demonstrate the absence of any express authorization for a taking.

C. The "Fee In Lieu Of" Provision of Section 653 Does Not Satisfy the Requirement of Just Compensation.

On the assumption that Congress intended a taking in the OVS provision (refuted above), the LECs proceed to claim that the "fee in lieu of franchise fees" specified in the Act represents just compensation. But the "fee in lieu of" language says nothing about just compensation or a taking of property. Rather, § 653 simply substitutes this fee for the franchise fee applicable to cable operators under § 622 of the Cable Act, with the apparent intent of matching the franchise fee burdens on OVS and cable competitors. Section 653 nowhere suggests in any way that the fee in lieu, in and of itself, is sufficient compensation for the OVS operator's use of the public rights-of-way.

Even if Bell Atlantic et al. were correct (and they are not) in claiming that Congress intended the fee in lieu as just

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[25] See our Comments at 57 n.73.

compensation, that would not make that compensation just.[26] The amount of just compensation due is a matter for the judiciary, not Congress, to determine.[27] Such a determination is not superseded by congressional fiat.[28] Nor will courts permit the Commission or Congress to prescribe a nominal amount as compensation for right-of-way access. Rather, an affected local government would be constitutionally entitled to compensation measured by fair market value.[29]

To the extent that such a fee falls short of what the local government receives from cable operators, it would not represent the fair market value of the local government's property

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[26] Cf. Reply Comments of Bell Atlantic et al. at 28 n.73 ("Congress has spoken on the fee issue and the Commission cannot ignore Congress' determination of what fees are appropriate"). See also NYNEX Reply Comments at 17.

[27] See, e.g., Miller v. United States, 620 F.2d 812 (Ct. Cl., 1980).

[28] If the amount provided by Congress for just compensation is less than a court deems to be the constitutional minimum, the court will look to the Tucker Act, 28 U.S.C. § 1491, to provide the necessary balance to achieve just compensation. See Blanchette v. Connecticut Greene Insurance Corps., 419 U.S. 102 (1974). The Tucker Act provides payment from the U.S. Treasury. Thus, if the Commission were to construe the Act as a taking of local government property interests, as the LECs wish, the federal Treasury would be forced to subsidize the shortfall not covered by the fee in lieu.

[29] See, e.g., United States v. Commodities Trading Corp., 339 U.S. 121, 126 (1950); Bell Atlantic, 24 F.3d at 1445 n.3.

interests.[30] It is therefore insufficient to validate any allegedly authorized taking of the local government's property rights by OVS operators under color of Commission rules.

And in fact, the fee in lieu would not be sufficient. Part of a cable operator's compensation for use of rights-of-way is outside the franchise fee — PEG facilities and equipment and system facilities and equipment, to name just a few. And of course, the LECs argue that OVS operators do not have to match those requirements. If the LECs are correct, they are merely confirming the inadequacy of the fee in lieu as just compensation.

D. LECs' Existing Authorizations to Use Local Rights-of-Way to Provide Local Telephone Service Do Not Extend to OVS.

The LECs claim that many LECs already have authority to use the rights-of-way, and that OVS falls within this authority.[31] Yet they offer no examples for the Commission's or other

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[30] As pointed out in our comments, the total compensation cable operators pay for use of the local public rights-of-way consists of both franchise fees and additional forms of compensation. Thus, payments matching cable franchise fee payments alone do not represent the full market value of the compensation that a cable operator pays to a local community. Thus, NYNEX, for example, succeeds only in confirming the inadequacy of the fee in lieu provision when it argues elsewhere that an OVS operator cannot be required to provide in-kind benefits. NYNEX Reply Comments at 17.

[31] Reply Comments of Bell Atlantic et al. at 28 n.71, 32; NYNEX Reply Comments at 18 n.39.

commenters' review. As we pointed out in our comments, it would be curious if any existing authority did cover OVS, considering that OVS was invented only in February 1996, and most telephone franchises predate that event. Nor is the Commission in any position to judge what rights may or may not have been granted in varying agreements under varying state laws.[32] Thus, the Commission cannot rule on whether existing grants cover OVS. If an OVS applicant believes that its use of the rights-of-way for OVS is authorized by a pre-existing grant, it must be up to the applicant to show this in its certification filing.[33]

2. The LECs' interpretation of the Act to effect a taking will result in additional fiscal liability for the federal government.

In light of the above, the LECs' interpretation of the Act as authorizing a taking would expose the federal government to fiscal liability under the Tucker Act, 28 U.S.C. § 1491(a), that

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[32] NYNEX concedes that telephone franchises are creatures of state law. NYNEX Reply Comments at 18 n.39. The Commission, of course, has no special competence or even jurisdiction to apply or interpret such state laws. Moreover, NYNEX is incorrect in asserting that its "telephone franchise covers the use of telephone plant to provide OVS service." Id. An OVS is a "cable television system" as that term is defined in New York state law, and under New York state law, such a system requires a franchise independent of a telephone franchise. See N.Y. Executive Law § 812(2), 819(2) (McKinney, 1996).

[33] If the LECs believe that existing right-of-way authorizations cover OVS, it is hard to understand why they object so strenuously to demonstrating that they have adequate authorizations as part of their certifications.

was neither contemplated nor authorized by Congress.[34] If the Commission were to exempt LECs from paying the true costs associated with their use and occupancy of the rights-of-way, just as they would pay for any other property, the Commission would force federal taxpayers to supply the fair market value that the Takings Clause requires. The Commission cannot impute such an intent to Congress without far clearer direction than the Act provides.

The LECs claim to fear delays in the introduction of OVS. But such delays would arise, not from recognizing local communities' rights over their public rights-of-way, but from any attempt by the Commission, despite its lack of authority under the statute, to usurp local property rights. The LECs are eager to have the Commission — and federal taxpayers — "front" for the LECs by attempting to take local property rights and defend the resulting legal challenges. The Commission should decline this dangerous invitation and follow the statute as it was written, not as the LECs wish it had been written.

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[34] See generally Hooe v. U.S., 218 U.S. 322, 329, 31 S. Ct. 85, 87.

TALKING POINTS FOR FEDERAL COMMUNICATIONS COMMISSION

1. OVS is one of four ways a telephone company can get into the video business; Congress did not intend for it to be the only way. The Commission should not be cowed into believing that OVS must become the dominant means for local exchange carriers to offer video services.

2. RBOCS state that Congress wants OVS to be successful, but they don't say why. Congress wanted OVS to be successful because it is intended to offer meaningful opportunities for third party access. If it fails to meet this requirement, it can't be called successful, even if it is used by the entire industry.

3. OVS should succeed -- but it should succeed because it offers video customers a distinctly different type of product. The RBOCs are using the imperative that OVS succeed at any price as a transparent ploy to undercut Title VI regulation.

4. RBOCs can get into cable right now, and do so on a regulatory level playing field. US West has bought Continental, and other RBOCs own significant chunks of other MSOs. RBOCs cannot claim they will not enter the video services market unless they are induced by favorable OVS rules. They are already active participants in the video services market.

5. The RBOCs are trying to suggest that OVS systems will always be overbuilds competing with existing cable operators. But there is no reason for this to be the case. We believe that the paradigm is more like the US West buyout of Continental -- a local exchange carrier will take a cable system and request that the commission call it OVS. It is this paradigm that should govern the Commission's thinking. If less regulation were required as an incentive to overbuild, then privileges should be triggered by overbuilding. But the commission is prohibited by law from conditioning OVS certification on this. The Commission should not use a competitive paradigm where one will probably not arise.

6. OVS will consequently only provide regulatory relief for monopolistic providers in most instances.

7. Market forces will not lead to competition where they have not done so already. Regulatory reduction will only lead to entrenchment of monopolistic providers. Allowing cable companies to switch to OVS will not lead to fair competition, but will simply make MSOs more likely targets for RBOC buyouts.

8. The Cable Bureau's experience with regulating leased access on cable illustrates the difficulties the Commission faces in persuading video providers to permit nondiscriminatory third-party access.

9. The RBOCs are asking the Commission to give OVS operators editorial control through the back door by permitting any discrimination which comports with their marketing plan. The Commission cannot permit this to happen This defeats the purpose of OVS, which was to create a platform accessible to programmers not of the operator's choosing.

10. The Commission should not be disingenuous about the efficacy of dispute resolution as opposed to issuing sensible regulations. The dispute resolutionprocess always favors the party with the most financial resources. A small town in Minnesota is not in a financial position to take all its disputes with US West to the Commission. But the Commission can issue bright-line rules and revoke certification if the town in Nebraska files a complaint with the Commission -- a much less cumbersome administrative procedure.

11. RBOCs are asking for the authority to discriminate as to access. They should be required to provide examples of what they consider to be reasonable discrimination. In the absence of such statements, we can only assume that they mean "ad hoc" or "arbitrary." Certainly the standard "reasonably required to enable the system to compete effectively" is no standard at all -- particularly when there is no competition.

12. Non-discriminatory rates and non-discriminatory access require some form of rate regulation. In exempting OVS from Title II, that is all they did -- but use of Title-II like language clearly implies that some form of regulation is authorized, even if not precisely like Title II.

13. Public disclosure of contracts is a sine qua non for a determination of whether a contract is reasonable; there is no way to make such discrimination apparent without comparing it to the terms and conditions offered other providers, including the OVS platform operator's own affiliate. Permitting any entity to have access at terms disclosed by a previous contract is an excellent way to prevent discrimination without engaging in rate regulation activities. And requiring to offer the same rates to others as it offers to its own affiliate will provide further assurances that the rates charged are fair.

14. We are not asking the Commission to require OVS operators to negotiate with franchise authorities -- but we believe they will want to in order to build a cooperative arrangement for joint provision of PEG services in those areas where OVS is an overbuild.

15. It is both technically and economically feasible to provide franchise-specific PEG narrowcasting. Cable operators are able to offer it profitably -- there is no reason why OVS operators cannot do so too -- as long as they are aware of that requirement in advance.

16. Section 611, read in its entirety, clearly encompasses the authority to require capacity, services, facilities and equipment -- otherwise, Section 611(c) would be surplusage in the context of the OVS statute. The RBOCs interpretation that services, facilities and equipment are not required clearly contravene Congress' intent that such services be offered to extent neither greater nor lesser than their cable system counterparts.

United States Senate

WASHINGTON, DC 20510-3703

May 20, 1996

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M St. NW
Washington DC, 20554

Dear Chairman Hundt:

It is my understanding that the Cable Services Bureau of the Commission is in the process of promulgating rules, due by August 6, 1996, implementing the "Open Video Systems" provisions of the Telecommunications Act of 1996, PL. 104-104 (302(1996).

Congress' intention in passing this provision was to allow voices that currently have limited or no access to a video platform, whether broadcast, cable, DBS, or "wireless cable," to create and show television programming subject to terms, rates, and conditions that are fair and reasonable. These voices include those of elementary and secondary schools, churches and synagogues, charitable institutions, local governing bodies and state and local agencies.

With regard to PEG access on OVS systems, it is my hope that it would at least equal the level of access, services, facilities, equipment and support available to PEG access centers on cable systems and that the rates charged, if any, are the lowest available. The rules should also ensure that access to video platforms by programmers unaffiliated with the OVS platform operator is available.

The 1996 Telecommunications Act should open exciting new vistas for meaningful electronic expression by schools, nonprofit, churches, community support organizations, and governmental bodies and agencies. I believe, however, that this will only happen if the Commission follows Congress' intent. I therefore urge you to give special attention to the regulatory comments of the Alliance for Community Media, Consumer Federation of America, and People for the American Way in this rulemaking, and to approve regulations which guarantee meaningful opportunities for access to the OVS platform by all Americans.

Sincerely,

Ron

RON WYDEN
United States Senator

GLENN

United States Senate

WASHINGTON, DC 20510–3501

- GOVERNMENTAL AFFAIRS
- ARMED SERVICES
- SELECT COMMITTEE ON INTELLIGENCE
- SPECIAL COMMITTEE ON AGING

May 20, 1996

Mr. Daniel Phythyon
Director
Office of Legislative Affairs
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Mr. Phythyon:

It is my understanding that the Cable Services Bureau of the Commission is currently in the process of issuing the rules implementing the "Open Video Systems" provisions of the Telecommunications Act of 1996 (P.L. 104-104). The statute requires the Commission to announce any rules under this section no later than August 8, 1996.

I have been contacted by individuals who are associated with public, educational and governmental (PEG) access centers regarding these regulations. They are concerned that OVS regulations should not violate the spirit of the OVS provision which was intended to allow interests, that currently have limited or no access to video platforms, to create and distribute television programming subject to terms, rates and conditions that are fair and reasonable. Please give careful consideration to the regulations that:

- With regard to PEG access on OVS systems, produce a result that at least equals the level of access, services, facilities, equipment and support available to access centers on cable systems;
- Ensure that access to video platforms by programmers unaffiliated with the OVS platform operator is readily available by exercising the Commission's statutory authority to impose some level of rate and regulatory structuring of platform access; and,
- Follow the clear intent of Congress in creating OVS as a means of encouraging telephone companies to enter the video services market, by prohibiting cable operators who are already present in the video market from converting to the OVS regulatory system.

Please inform me of the latest action on this provision. Thank you for your thoughtful consideration of this request.

Best regards.

Sincerely,

John Glenn
United States Senator

JG/mb

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Anna G. Eshoo
14th District, California
Congress of the United States
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CO-CHAIR,
MEDICAL TECHNOLOGY CAUCUS

April 11, 1996

The Honorable Reed Hundt, Chairman
Federal Communications Commission
1919 M Street NW
Washington, D.C. 20554

Dear Chairman Hundt,

I am writing regarding the Cable Services Bureau's work on promulgating rules implementing the "Open Video Systems" provisions of the Telecommunications Act of 1996. The statute requires the Commission to promulgate any rules under this section no later than August 8, 1996.

I am forwarding letters from constituents of mine who are associated with public, educational and governmental ("PEG") access centers in my district. They have contacted me with their concerns that OVS regulations not violate the spirit of the OVS. In particular, they support regulations that:

> provide a level of access for PEG centers on OVS systems equal to that available on cable systems;
>
> ensure that programmers have equal access to OVS systems regardless of whether the programmer is affiliated with the OVS operator; and,
>
> prohibit cable operators from converting to the OVS regulatory system.

I strongly believe that citizens, schools, libraries, health care facilities, and others who wish to utilize telecommunications channels should have reasonable and equitable access to OVS platforms.

I urge you to carefully consider their comments as you develop these regulations.

Sincerely,

Anna Eshoo

Anna G. Eshoo
Member of Congress

AGE:sv

5TH DISTRICT, WISCONSIN

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Congress of the United States

House of Representatives

Washington, DC 20515-4905

April 1, 1996

Mr. Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Dear Chairman Hundt:

I am writing to ask your assistance in safeguarding the availability of public, educational and government (PEG) programming to television viewers under the new telecommunications law. I appreciate your assistance in this matter.

As you know, President Clinton signed the Telecommunications Act of 1996 into law on February 8. The bill allows telephone companies to offer video programming in their service areas, subject to certain restrictions depending on the type of programming offered.

The bill directs the FCC to adopt regulations within six months relating to the creation of open video systems. I am hopeful that you will use this process to ensure that the operators of open video systems give PEG broadcasters at least the same access, services, facilities and equipment currently available from cable television systems.

Public, educational and government broadcasts provide an important local resource for television viewers. I am certain that you share my goal of maintaining access to this programming as we approach the 21st century.

Thank you again for your consideration.

Sincerely,

Tom Barrett

Tom Barrett
Member of Congress

TB:bg

ROB PORTMAN
SECOND DISTRICT, OHIO

COMMITTEE ON
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May 20, 1996

Mr. Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Dear Mr. Hundt:

As you may know, the Cable Services Bureau of the Commission is currently in the process of promulgating rules to implement the Open Video Systems provisions of the Telecommunications Act of 1996. I understand the statute requires the Commission to issue any rules under this section (including any reconsideration) no later than August 8, 1996.

It is my belief that Congress' intent in passing the OVS provision was to allow those voices that currently have limited or no access to video platforms to create and show television programming subject to terms, rates and conditions that are fair and reasonable. These include elementary and secondary schools, churches and synagogues, charitable institutions, local governing bodies and state and local agencies.

Constituents of mine who are associated with public, educational and governmental (PEG) access centers in my district have expressed concerns that OVS regulations not violate the spirit of the OVS provision. They have asked me to express my support for regulations that will produce at least equal the level of access, services, equipment and support available to "PEG" access centers. More specifically, they wish to preserve the Commission's statutory authority to impose some level of rate and regulatory structuring of platform access to ensure that access to video platforms by programmers unaffiliated with the OVS platform operator is readily available. Finally, they wish to support the intent in creating OVS -- namely to encourage telephone companies to enter the video services market.

Mr. Chairman, I am hopeful that, with your guidance, the 1996 Telecommunications Act will provide new opportunities for meaningful electronic expression by schools, non-profits, churches, community support organizations, and governmental bodies and agencies.